SUPREME COURT, U. S. THE
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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1191

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, and AETNA INSURANCE COMPANY,

Petitioners,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT NEW YORK NAVIGATION COMPANY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Statement of Facts 2

Lower Court Decisions 5

Questions Presented 6

Argument 7

POINT I—

The two decisions below found that Iligan did not sustain its burden of proof in showing gross negligence or such willful and wanton misconduct so as to constitute an unreasonable deviation that would displace the contract of carriage 8

POINT II—

The U.S. Supreme Court holding in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), is not applicable in this case because the limitation provisions including those found in COGSA were contractually binding upon both Iligan and New York Navigation 13

CONCLUSION 15

PAGE

CASES CITED

Bernard Screen Printing Corp. v. Meyer Lines, 464 F. 2d 934, 936 (2nd Cir., 1972), cert. denied, 410 U.S. 910 (1973) 14

Cabot Corp. v. S.S. Mormacscan, 441 F. 2d 476, 478 (2nd Cir., 1970), cert. denied, 404 U.S. 855 (1971) 14

Carle & Montonari, Inc. v. American Export Isbrandtsen Lines, Inc., 386 F. 2d 839 (2nd Cir., 1967), cert. denied, 390 U.S. 1013 (1969) 14

Deep Sea Tankers v. The Long Branch, 258 F.2d 757 (2nd Cir., 1958) 12

Famous Knitwear Corporation v. Drug Fair, Inc., 493 F. 2d 251, 253 (4th Cir., 1974) 10

Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959) 13

Imperial Oil Co. v. Drlik, 234 F. 2d 4, 10 (6th Cir.), cert. denied, 352 U.S. 941 (1956) 11

Leach v. Crucible Center Co., 388 F.2d 176 (1st Cir., 1968) 11

Lundgren v. Freeman, 307 F. 2d 104 (9th Cir., 1962) .. 11

Mamiye Brothers v. Barber Steamship Lines, Inc., et al., 360 F.2d 774, 776-778 (2nd Cir.), cert. denied 385 U.S. 835 (1966) 10, 11

Merritt v. Interstate Transit Lines, 171 F. 2d 605, 608-609 (8th Cir., 1948) 11

PAGE

Nye v. A/S D/S Svendborg and D/S A.F. 1912 A/S, 501 F.2d 376 (2nd Cir.), cert. denied 43 U.S.L.W. 3473 (March 3, 1975) 11

Pacific Tow Boat Co. v. States Marine Corp., 276 F.2d 745, 752 (9th Cir., 1960) 11

Secrest Machine Corp. v. S.S. Tiber, 450 F.2d 285, 286 (5th Cir., 1971) 14

Tessler Brothers (B.C.), Ltd. v. Italpacific Line, 494 F.2d 476, 478 (9th Cir., 1974) 14

The Bellhaven, 2nd Cir., 72 F. 2d 206, 209 12

The Secondbee, 6 Cir., 102 F. 2d 577, 581 12

Thorne, Neale & Co. v. Reading Co., 2 Cir., 87 F. 2d 694, 696 12

STATUTES

46 U.S.C. Section 1304(5) 3, 7

Fed. R. Civ. P. 52(a) 10, 11, 12

OTHER SOURCES

Wright & Miller, Federal Practice and Procedure, Volume 9, Section 2590, P. 765 10

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Opinions Below

The opinion of the District Court of the Southern District of New York is reported at 372 F. Supp. 859 and appears in Petitioners' Appendix A. The opinion of the Court of Appeals as modified is reported at 507 F. 2nd 68 and appears in Petitioners' Appendix C. The Order of the Court

of Appeals modifying its opinion on rehearing appears in Petitioners' Appendix D. The Order of the Court of Appeals denying a rehearing *en banc* appears in Petitioners' Appendix E.

Jurisdiction

Respondent New York Navigation Company, Inc. agrees with Petitioners' jurisdictional statement. No issue is presented on this point.

Statement of Facts

Petitioners' statement of facts is so inadequate that we find it necessary to state them more fully.

On July 11, 1966, New York Navigation agreed with Iligan to provide a sufficient number of "suitable and seaworthy vessels" to transport materials to be shipped by Petitioners from U.S. ports to Iligan City, Republic of Philippines, at agreed freight rates. The written agreement provided further that New York Navigation's standard form of bill of lading was to be used on all shipments and was to be stamped subject to the said agreement.

New York Navigation, in turn, time-chartered the vessel in suit from Weyerhaeuser at a monthly rate, on a New York Produce Exchange Form Time-Charter, dated September 7, 1966. This form of agreement in turn provided that the vessel was to be "tight, staunch, strong and in every way, fit for the service", and the owners would "maintain her in Class and keep the vessel in a thoroughly efficient state. . . ."

The bill of lading issued to Iligan by New York Navigation Company on its standard form was dated December 16, 1966, and Paragraph 1 thereof incorporated the U.S. Carriage of Goods by Sea Act. Clause 2 provided that the word "carrier" as used in the bill of lading, "shall include the ship, the owners, . . . and if bound thereby, the time-charterer." Clause 17 contained a $500 package limitation substantially similar to the one found in the U.S. Carriage of Goods By Sea Act, 46 U.S.C. §1304(5), hereinafter COGSA.

Before the commencement of the charter party, New York Navigation appointed National Cargo Bureau to survey the vessel at Baltimore. The vessel was found in class in all respects and the vessel was accepted on charter. Only two months before the vessel had undergone U.S. Coast Guard and American Bureau of Shipping surveys at Portland, Oregon.

The shipment in question was stowed in No. 2 and No. 4 holds of the S.S. JOHN WEYERHAEUSER. A total of "1087 packages" of cargo was loaded. The cargo was described in 17 riders attached to the bill of lading.

The loading and stowage of the shipment was also approved by the National Cargo Bureau at Baltimore.

The vessel sailed from Baltimore on the night of December 16, 1966, bound for Tampa, Florida, and arrived on December 22, 1966. Hatches Nos. 1, 3, and 5, were inspected by National Cargo Bureau surveyors and approximately 7,000 tons of triple superphosphate in bulk was loaded. The holds, prior to loading, were found to be absolutely dry. Had there been a hole at that time in the sanitary line, which passes through the hold, waste from the toilets and sinks up above would have been evident to the inspectors and longshoremen. The vessel sailed from Tampa on De-

cember 23, 1966, and next called at Cristobal, Panama, on December 29, 1966, in order to bunker.

At Panama, the vessel also underwent engine repairs until January 12, 1967. During the period of time that the vessel's engines were being repaired, the vessel was off hire. There was a problem in No. 2 and No. 3 holds. No reports were made to the charterer of any leakage.

The vessel proceeded towards Moji, Japan, to replenish her fuel oil and water before proceeding to Mokpo, Korea, to discharge the triple superphosphate. The vessel arrived at Moji on February 22, 1967, and the Chief Officer read the draft, which was greater than anticipated, and after inspections of the hatches, sea water was found in No. 2 and No. 3 holds.

Weyerhaeuser then arranged for an American Bureau of Shipping surveyor to attend and a leak was found in the port side sanitary storm valve in No. 3 lower hold. The storm valve is attached to the vessel's sanitary line which discharges overboard. It is fitted with a check valve to prevent sea water from entering the line and to permit the sanitary line to be pumped overboard. The check valve was found "frozen" in the open position and the body of the valve was found to be "wasted" from the inside. A hole, approximately two inches by one quarter inch had developed, which permitted sea water to enter into the lower hold of the ship.

Temporary repairs were conducted to the satisfaction of the American Bureau of Shipping surveyor and after a check by divers of the underwater portion of the hull, the vessel was permitted to proceed on its voyage.

During the voyage from Moji, to Mokpo, the storm valve was found leaking again, and at Mokpo, another American Bureau of Shipping surveyor attended on board and further repairs were conducted. After discharging the triple superphosphate, the vessel sailed for Iligan City and arrived on March 26, 1967.

On March 27, 1967, after Iligan and the owners had each appointed attorneys and surveyors, No. 2 hatch was opened. The surveyors thereafter attended to the damaged cargo.

When the vessel returned to the West Coast of the United States, the storm valve was removed from the vessel and sent to metallurgists for analysis. The valve was also examined by Weyerhaeuser supervisory personnel and all agreed that the inside of the valve was wasted which caused a hole to develop. Except for the hole which had developed from the inside, the outside of the valve looked all right.

Numerous witnesses were produced both at depositions and at trial in reference to the circumstances surrounding the entry of the sea water with particular emphasis being placed on the knowledge or lack of it on the part of the owners or the charterers of the S.S. WEYERHAEUSER in reference to this problem. There was no evidence that anyone had ever observed a leak in the valve before the voyage in suit began.

Lower Court Decisions

This action was brought in the United States District Court for the Southern District of New York, Iligan Steel Mills, Inc., et al., against Weyerhaeuser Company, owners of the S.S. JOHN WEYERHAEUSER, and against New York

Navigation Company, Inc., charterers of said vessel, to recover $3,000,000 for wetting, rusting, contamination, leakage and shortage of packages of steel and electrical products shipped by Iligan from Baltimore, Maryland and consigned to Petitioners, at Iligan City, Republic of the Philippines.

This action was originally assigned to the late Honorable Edward C. McLean and a three and one half day trial was held in July, 1972, before Judge McLean. Judge McLean died a short time later, before rendering an opinion, but after all the evidence and briefs were in.

The case was reassigned to the Honorable Robert J. Ward, and under a Stipulation entered into and signed by all parties, it was agreed that the case would be decided on the record as made before Judge McLean. Judge Ward decided the case in March, 1974, after reviewing and considering the record for over a year and after hearing extensive oral arguments in February, 1974.

The relevant holdings in the District Court will be discussed below, along with the affirmance of the District Court opinion, by the U.S. Court of Appeals for the Second Circuit.

Questions Presented

We shall consider the "QUESTIONS PRESENTED" as they appear in the petition below under "ARGUMENT".

Argument

Petitioners have gone to great lengths to spell out five issues that they believe to be of primary importance to the shipping industry as a whole. The questions, as urged by Petitioners, involve fraud, willful misconduct, gross negligence, deviation and the applicability of COGSA to non-carriers.

However, a reading of the decisions in the two lower Courts will clearly set the questions presented by Petitioners in proper perspective. Neither Court found any evidence of fraud, willful misconduct, gross negligence or deviation. The issues boil down to only one of whether the Respondents are entitled to the benefit of the $500 per package limitation provided by the United States Carriage of Goods by Sea Act, 46 U.S.C. §1304(5), in light of the lower Courts' holdings that the shipowner's failure to exercise due diligence to make the vessel seaworthy and the charterers' failure to furnish a seaworthy vessel as New York Navigation contractually warranted to do, in the July 11, 1966 agreement.

POINT I

The two decisions below found that Iligan did not sustain its burden of proof in showing gross negligence or such willful and wanton misconduct so as to constitute an unreasonable deviation that would displace the contract of carriage.

Petitioners in their Petition present a series of questions all based on the premise that the factual conclusions in the lower courts supported findings of fact that the Weyerhaeuser Company was guilty of deliberate, intentional, willful and wanton misconduct. This premise, apparently assumed by Petitioners, is not supported at all by the record, witnesses' testimony or by the holdings of either the District Court or the Court of Appeals.

The District Court, after carefully reviewing all the witnesses' testimony, exhibits and depositions for over one year, concluded that the ship was unseaworthy in Cristobal because of the wasted clapper valve, but that the Master did not, in Cristobal or any time prior to Cristobal, have knowledge of the actual defect in the ship.

Judge Ward, after reviewing the testimony and facts of the case in detail, wrote as follows:

> "In the judgment of this Court, Plaintiff has not proved that Weyerhaeuser knew or must have known of the unseaworthy condition of the ship." 372 F. Supp. at 865.

The District Court fully realized that Petitioners were asking the Court to carve out a new category in the law of maritime deviation. Judge Ward made the following comment after rejecting Petitioners' legal argument:

> "This is admittedly a novel theory, and this Court is not prepared *on the facts before it* so to extend the concept of deviation." (Emphasis added.) 372 F. Supp. 865-866.

Once the District Court found that Petitioners had failed to meet their burden of proof on their "novel theory", Petitioners' legal arguments became moot.

However, Iligan continued to press for an award of full damages based on what the District Judge termed "a novel theory" by taking the District Court decision on appeal to the Court of Appeals for the Second Circuit.

Despite the lack of factual basis, Iligan pressed its effort to have a court hold that gross negligence was a new kind of unreasonable deviation. The Court of Appeals noted that the dicta in their opinion was an exercise in order to clarify the extension of non-geographic (quasi) deviation cases in future cases and was not applicable to the case at bar. 507 F. 2d at 70.

Judge Friendly immediately noted that Petitioners' theory was "premised on a factual claim that the owner was on notice of the defect before the voyage began". 507 F. 2d at 70. Judge Friendly stated that this was a necessary finding of fact before any legal conclusions could be reached on Iligan's theory of full liability.

The Court of Appeals held, after reviewing the testimony, evidence, exhibits and briefs, that Petitioners had not sustained their burden of proof to warrant such a finding of fact.

The Court of Appeals noted that Judge Ward had not committed any error in his conclusion that:

> "Plaintiff has not proved that Weyerhaeuser knew or must have known of the unseaworthy condition of the ship prior to the trans-Pacific voyage, 372 F. Supp. at 865, he did not decide what result a contrary conclusion would have demanded." 507 F. 2d at 70.

The Court of Appeals based this decision on the Second Circuit's interpretation of Rule 52(a) of the Federal Rules of Civil Procedure.

The Judges held unanimously that the District Court's finding of facts were supported by the record. This is a significant holding in that the Second Circuit has for a considerable period of time examined factual issues on its own, rather than be limited by the "unless clearly erroneous" standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure.

The divergence of the Second Circuit from the majority rule has been conspicuous since its definitive decision on the subject in *Mamiye Brothers* v. *Barber Steamship Lines, Inc., et al.,* 360 F. 2d 774, 776-778, *cert. denied* 385 U. S. 835 (1966). Despite comments that the Second Circuit has retrenched somewhat, see, for example, *Famous Knitwear Corporation* v. *Drug Fair, Inc.,* 493 F. 2d 251, 253, footnote 2 (4th Circuit, 1974) and *Wright & Miller, Federal Practice and Procedure,* Volume 9, §2590, P. 765, recent decisions, including the one at bar, would indicate that the Court below is as determined as ever to pursue its own way. This approach inevitably leads into forays into factual areas, normally beyond the scope of review except by the "clearly erroneous standard".

It is apparent that the Second Circuit is still following its own standard of review, as in the case at bar, Circuit

Judge Friendly, author of *Mamiye Bros.* v. *Barber Steamship Lines, Inc., supra,* notes:

> "Although we do not consider the Judge's conclusions to be in error, *even under this Circuit's standard for review . . . .*" (emphasis added), citing *Mamiye* (507 F. 2d at 70), and where it is noted that the decision of the fact-finder was:
>
> "protected in many circuits by the 'unless clearly erroneous' rule, see e.g. *Merritt* v. *Interstate Transit Lines,* 171 F. 2d 605, 608-609 (8th Cir., 1948); *Imperial Oil Co.* v. *Drlik,* 234 F. 2d 4, 10 (6th Cir.), *cert. denied,* 352 U.S. 941 (1956); *Pacific Tow Boat Co.* v. *States Marine Corp.,* 276 F. 2d 745, 752 (9th Cir., 1960) and enjoying great weight even in this one." 507 F. 2d at 72.

The fact remains that the Court of Appeals carefully reviewed the factual findings of the trial judge and without a doubt would have reversed the lower court's decision if the findings did not conform to their rigid standard of review. See *Nye* v. *A/S D/S Svendborg and D/S A.F. 1912 A/S,* 507 F. 2d 376 (2nd Cir., 1974), *cert. denied,* 43 U.S.L.W. 3473 (March 3, 1975).

As noted above, this case was decided by a trial judge who did not have the opportunity to view and judge the credibility of the live witnesses at trial. However, this argument is without merit as both the history and the explicit language of Rule 52(a), shows that the "clearly erroneous" test is applicable even though the trial judge has not had the opportunity to judge the credibility of the witnesses. *See, Lundgren* v. *Freeman,* 307 F. 2d 104 (9th Cir., 1962); *Leach* v. *Crucible Center Co.,* 388 F. 2d 176 (1st Cir., 1968).

In any event, the Second Circuit Court of Appeals has had the opportunity to review a case that was tried before one Judge, who died shortly after the record had been completed, and decided by a new district judge after a study of the record.

In *Deep Sea Tankers* v. *The Long Branch,* 258 F.2d 757 (2nd Cir., 1958), the Court of Appeals after reviewing the lower court's opinion, reversed. In reversing Circuit Judge Medina wrote:

> Since the opinion and findings below are based upon the cold record alone, without the benefit of seeing and hearing numerous witnesses who testified before Judge Goddard, and, as this Court has noted 'we have an eventual responsibility for the facts as well as the law'. *The Bellhaven,* 2nd Cir., 72 F. 2d 206, 209; *Thorne, Neale & Co.* v. *Reading Co.,* 2 Cir., 87 F. 2d 694, 696; *See also, The Secondbee,* 6 Cir., 102 F. 2d 577, 581, . . . (we) have made new findings of fact in accordance with the clear weight of the evidence." 258 F. 2d at 759-760.

It is submitted that the Court of Appeals either by means of their interpretation of Rule 52(a) or their holding of *Deep Sea Tankers* v. *Long Branch, supra,* were free to reverse the findings of fact in this case. However, after careful review, they concurred with the District Court's findings.

A reading of Point I of Respondent Weyerhaeuser's brief will clearly show that these findings of fact were fully supported by the record.

POINT II

The U.S. Supreme Court holding in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), is not applicable in this case because the limitation provisions including those found in COGSA were contractually binding upon both Iligan and New York Navigation.

Petitioners contend that the Court below made a clear mistake of law in not applying the holding of this Court in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), that the U.S. Carriage of Goods by Sea Act only applies to "carriers".

In the *Herd* case, the District Court and the Fourth Circuit held a stevedoring company liable for the full amount of damage caused when a crated press fell into the harbor during loading by the stevedores. The stevedores' contention that its liability was limited by the provision of COGSA and the applicable bill of lading provisions limiting liability to $500 per package was rejected. The Supreme Court reaffirmed and pointed out that COGSA provided "neither the carrier nor the ship" shall be liable in an amount exceeding $500.00 per package. In the Court's opinion, neither the language nor the history of the Act indicated "an intent" to regulate third parties liability.

The *Herd* Court concluded that the stevedore's liability was not limited because no statute limited it and because the stevedore "was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by the contract". 359 U.S. at 308.

However, since that holding a number of courts have held that under certain circumstances, parties to a contract may limit an agents', stevedores' or other third party's liability even though they are not a "carrier", by clearly expressing the intent to do so. In other words, a third party may "benefit" from a contract of carriage by incorporation. See *Bernard Screen Printing Corp.* v. *Meyer Line,* 464 F. 2d 934, 936 (2nd Cir., 1972), *cert. denied,* 410 U.S. 910 (1973); *Secrest Machine Corp.* v. *S.S. Tiber,* 450 F. 2d 285, 286 (5th Cir., 1971); *Tessler Brothers (B.C.) Ltd.* v. *Italpacific Line,* 494 F. 2d 476, 478 (9th Cir. 1974); *Cabot Corp.* v. *S.S. Mormacscan,* 441 F. 2d 476, 478 (2nd Cir., 1970), *cert. denied,* 404 U.S. 855 (1971); *Carle & Montonari, Inc.* v. *American Export Isbrandtsen Lines, Inc.,* 386 F. 2d 839 (2nd Cir., 1967), *cert. denied,* 390 U.S. 1013 (1969).

In the case at bar, the District Court held that the controlling contract between Iligan and New York Navigation was the Agreement of July 11, 1966. Clause 11 of the Agreement stipulated that the bill of lading controlled the loading and transportation of the cargo to be shipped. 372 F. Supp. 869. The District Court held that contractually, the provisions of COGSA were incorporated into the bill of lading and thereby into the Agreement and the parties had effectively limited New York Navigation's liability by such incorporation. 372 F. Supp. 871.

Therefore, the *Herd* decision is clearly not relevant in this instance, in that in the case at bar, both courts below found that *contractually* New York Navigation had afforded itself the protection of the $500 limitation by the incorporation of both the statutory provisions of the U.S. Carriage of Goods By Sea Act and the similar contractual limitations found in Clause 17 of New York Navigation's bill of lading.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

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